A

LAWRENCE MASUNI & ANOR

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
SYED AHMAD HELMY JCA
MOHAMED APANDI ALI JCA
[CRIMINAL APPEAL NOS: Q-05-105-04(A) &
C Q-05-105-04 (B)]
30 NOVEMBER 2010

CRIMINAL LAW: *Penal Code - Sections 34, 302 - Murder - Appeal against conviction - Prima facie case - Whether established - Whether*
D *nature of wounds inflicted showed intention to kill - Whether defence of denial laced with inconsistencies properly rejected - Whether confession in accused's cautioned statement properly admitted - Whether common intention established - Whether prosecution witness an accomplice and his evidence properly accepted*

E

CRIMINAL PROCEDURE: *Trial - Confession - Admissibility - Confession made in cautioned statement - Whether statement by 1st accused pertaining to 2nd accused hitting the deceased was a confession admissible against 1st accused - Whether confession per se of a co-accused*
F *can be made foundation of a conviction - Whether cautioned statement could be used as an aid to support conviction - Evidence Act 1950, s. 30*

EVIDENCE: *Confession - Admissibility of confession - Confession made in cautioned statement - Whether statement by 1st accused pertaining to 2nd accused hitting the deceased was a confession admissible against 1st*
G *accused - Whether confession per se of a co-accused can be made foundation of a conviction - Whether cautioned statement could be used as an aid to support conviction - Evidence Act 1950, s. 30*

Both the accused/appellants were charged with the murder of one
H Willy Tuoh (deceased). The accused were drinking liquor with other persons on the evening of 6 August 1998 and the early hours of 7 August 1998. At about midnight the deceased came riding a motor scooter. The 1st accused and the deceased then left the area on the deceased's scooter and returned about 20 to
I 30 minutes later. After stopping for a while both of them again left

the area. Later, PW14 together with the 2nd accused went to the 1st accused's house but the 1st accused was not home. The 1st accused then returned home using the deceased's scooter, looking scared. He told PW14 that he had hit the deceased. The 1st accused brought PW14 and the 2nd accused to a dead-end lane where PW14 saw the deceased lying down with face downward still breathing and groaning. PW14 then saw both the accused each using a piece of plank hitting the deceased's head repeatedly. PW14 testified that during and after the hitting by both the accused the deceased stopped groaning. PW14 saw the 1st accused taking out a handbag from the compartment under the seat of the deceased's scooter and the 2nd accused taking from the deceased's neck a necklace. Both the accused upon being called to enter their respective defence elected to give an unsworn statement from the dock. The 1st accused denied assaulting the deceased with the plank causing the death of the deceased although admission was made that the earlier beating was done to ward off the sexual advances of the deceased. According to the 1st accused, he then brought PW14 and the 2nd accused to the place where the deceased had fallen. The 1st accused said that he heard the sound of hitting and the 2nd accused voice talking to PW14 and asking why he was hitting the deceased again. The 1st accused turned around and saw PW14 holding a piece of wood which he thereupon took away from PW14's hand and threw it away. The 2nd accused testified to the same effect. The learned trial judge after finding that the prosecution had proved its case beyond reasonable doubt and that both were guilty as charged, accordingly convicted them and passed the mandated sentence of death. Both accuseds appealed against the conviction and sentence, *inter alia*, on the following issues: (i) whether the cautioned statement (P64) was properly admitted; (ii) whether the learned trial judge erred in accepting the evidence of PW14 who was an accomplice; and (iii) whether the ingredients of the charge including the element of common intention had been proven beyond reasonable doubt.

Held (dismissing the appeal and affirming the conviction and sentence)

Per Syed Ahmad Helmy JCA delivering the judgment of the court:

(1) The learned trial judge correctly emphasised that the nature of the wounds inflicted was such that whoever inflicted those blows must have intended to kill the person on whom they were inflicted. (para 28)

A **(2)** The learned trial judge correctly found that PW14 was not an accomplice. The learned judge was of the view that the evidence of PW14 was not inherently incredible for acceptance. Had there been any truth in the line of defence as alleged in their unsworn statement, it was both logical and
B natural for the 1st accused to have stated it in his cautioned statement P64. (paras 31 & 32)

(3) The learned judge correctly rejected the defences of both accused. The defence being one of denial and laced with
C inconsistencies was insufficient to create any doubt. The inconsistencies in their unsworn statements, tested against the totality of the evidence adduced, was insufficient to create a doubt much less a reasonable doubt. (paras 35 & 36)

D **(4)** P64 was the cautioned statement of the 1st accused which was tendered by the prosecution without any objection by the defence. The content in P64 pertaining to the 2nd accused hitting the deceased with a plank was a confession which could be used against the 1st accused as the maker.
E (paras 37-40)

(5) Section 30(1) of the Evidence Act 1950 allows the court to take into consideration the confession of an accused implicating himself and his co-accused along with other evidence but a conviction based on such confession cannot
F stand. Though s. 30(1) allows the court to take the confessions of a co-accused into consideration thereby making it evidence, it is not proof and can only be used in support of other evidence. Confession *per se* of a co-accused cannot be made the foundation of a conviction. Although the accused did
G not challenge the admissibility of P64, nevertheless upon scrutiny of the evidence adduced from the testimony of PW9, PW11, PW13 and PW14 it was abundantly clear that there was evidence as to the culpability of the 2nd accused for which P64 could be used as an aid to support the conviction.
H (paras 41-43)

(6) The learned trial judge correctly directed his mind to the issue of common intention. After holding that the exh. P64 did not implicate PW14 in the hatching of any idea of finishing off the
I deceased, or in the actual infliction of further injuries upon the

deceased, the judge concluded, correctly, that the acts of both accused taking turns in hitting the back of the deceased's head with a piece of plank knowing that the deceased was already lying down groaning in pain, quite clearly indicated common intention on their part in snuffing out life from the deceased. (paras 48 & 49)

Bahasa Malaysia *Translation Of Headnotes*

Kedua-dua tertuduh/perayu telah dituduh membunuh seorang bernama Willy Tuoh (simati). Tertuduh-tertuduh pada petang 6 Ogos 1998 dan awal pagi 7 Ogos 1998 telah meminum arak dengan orang lain. Lebih kurang pada tengah malam, simati telah sampai dengan menunggang sebuah skuter. Tertuduh pertama dan simati kemudiannya telah meninggalkan kawasan tersebut atas skuter simati dan telah kembali semula 20 sehingga 30 minit selepas itu. Selepas singgah sebentar, mereka telah sekali lagi meninggalkan kawasan tersebut. Kemudian, PW14 bersama-sama dengan tertuduh kedua telah pergi ke rumah tertuduh pertama tetapi tertuduh pertama tidak berada di rumahnya. Tertuduh pertama kemudiannya telah pulang ke rumah dengan menggunakan skuter simati dalam keadaan takut. Beliau memberitahu PW14 bahawa beliau telah memukul simati. Tertuduh pertama telah membawa PW14 dan tertuduh kedua ke suatu lorong jalan mati dimana PW14 telah melihat simati terbaring meniarap, masih sedang bernafas dan sedang mengerang. PW14 kemudiannya melihat kedua-dua tertuduh memukul kepala simati berulang kali dengan menggunakan sekeping papan masing-masing. PW14 telah memberi keterangan bahawa semasa dan selepas menerima pukulan daripada kedua-dua tertuduh, simati telah berhenti mengerang. PW14 juga melihat tertuduh pertama mengambil sebuah beg tangan daripada ruang bawah tempat duduk skuter simati dan tertuduh kedua mengambil seutas rantai leher daripada leher simati. Kedua-dua tertuduh setelah diminta memasukkan pembelaan mereka telah memilih untuk memberi kenyataan tidak bersumpah dari kandang. Pihak tertuduh pertama telah menafikan bahawa beliau telah menyerang dan mencederakan simati dengan menggunakan sekeping papan yang akhirnya telah menyebabkan kematian simati walaupun pengakuan telah dibuat bahawa pukulan terdahulu telah dilakukan untuk menangkis ajakan seks oleh simati. Mengikut tertuduh pertama, beliau kemudiannya telah membawa

PW14 dan tertuduh kedua ke tempat dimana simati telah jatuh. Tertuduh pertama mengatakan bahawa beliau telah mendengar bunyi pukulan dan suara tertuduh kedua bertanyakan PW14 kenapa beliau telah memukul simati sekali lagi. Tertuduh pertama telah berpusing kebelakang dan melihat PW14 memegang sekeping papan yang beliau kemudiannya telah mengambil daripada tangan PW14 dan membuangnya. Tertuduh kedua telah memberi keterangan yang serupa. Hakim perbicaraan yang bijaksana telah membuat keputusan bahawa pihak pendakwaraya telah membuktikan kes mereka melampaui keraguan yang munasabah dan mendapati bahawa kedua-dua tertuduh bersalah sepertimana dituduh dan kedua-dua tertuduh telah didakwa dan dijatuhkan hukuman mati. Kedua-dua tertuduh telah merayu terhadap sabitan dan hukuman mereka, antara lain atas isu-isu berikut: (i) sama ada pernyataan beramaran (P64) telah diterima-masuk secara betul; (ii) sama ada hakim yang bijaksana telah melakukan kesilapan dengan menerima keterangan PW14 yang merupakan seorang rakan jenayah; dan (iii) sama ada bahan/isi tuduhan yang termasuk unsur niat bersama telah dibuktikan atas tahap melampaui keraguan yang munasabah.

Diputuskan (menolak rayuan dan mengekalkan sabitan dan hukuman)

Oleh Syed Ahmad Helmy HMR menyampaikan penghakiman mahkamah:

(1) Hakim yang bijaksana telah memberi tekanan yang betul dalam rumusan beliau bahawa jenis kecederaan yang telah diakibatkan adalah jenis dimana sesiapa yang mengakibatkan kecederaan tersebut sememangnya mempunyai niat untuk membunuh orang yang terlibat.

(2) Hakim yang bijaksana telah merumuskan secara tepat bahawa PW14 bukanlah seorang rakan jenayah. Hakim yang bijaksana berpendapat bahawa keterangan PW14 sememangnya tidak mustahil untuk diterima. Sekiranya terdapat kebenaran di dalam pembelaan sepertimana dinyatakan di dalam pernyataan beramaran pihak-pihak tertuduh, adalah mengikut logik untuk pihak tertuduh pertama menyatakannya di dalam pernyataan beramarannya P64.

(3) Hakim yang bijaksana betul di dalam keputusannya untuk menolak pembelaan kedua-dua tertuduh. Pembelaan tersebut yang merupakan suatu penafian semata-mata dan yang mengandungi butir-butir yang tidak konsisten tidak mencukupi untuk menimbulkan sebarang keraguan. Butir-butir yang tidak konsisten di dalam pernyataan beramaran mereka apabila diuji dengan segala keterangan yang dikemukakan, tidak mencukupi untuk menimbulkan keraguan apalagi keraguan yang munasabah.

(4) P64 merupakan pernyataan beramaran tertuduh pertama yang telah dikemukakan oleh pendakwaraya tanpa bantahan daripada pihak peguambela. Isi kandungan P64 yang merujuk kepada tertuduh kedua memukul simati dengan sekeping papan merupakan suatu pengakuan yang dapat digunakan terhadap tertuduh pertama sebagai pembuat kenyataan.

(5) Seksyen 30(1) Akta Keterangan 1950 membolehkan mahkamah mengambil kira pengakuan seorang tertuduh yang melibatkan dirinya dan rakan tertuduhnya bersama-sama dengan keterangan-keterangan lain, tetapi sabitan berdasarkan pengakuan sedemikian tidak boleh diterima. Walaupun s. 30(1) membolehkan mahkamah mengambil kira pengakuan seorang rakan tertuduh dan menjadikannya keterangan, ia bukanlah merupakan bukti dan hanya boleh digunakan untuk menyokong keterangan lain. Maka pengakuan seorang rakan tertuduh, dengan sendirinya, tidak boleh dijadikan asas pensabitan. Walaupun si tertuduh tidak mencabar kebolehterimaan P64, penelitian keterangan yang diambil daripada PW9, PW11, PW13 dan PW14 menunjukkan dengan jelas kewujudan keterangan berkenaan kebersalahan pihak tertuduh kedua dimana P64 dapat digunakan sebagai bantuan untuk menyokong sabitannya.

(6) Hakim yang bijaksana telah mengarahkan dirinya secara betul kepada isu niat bersama. Setelah membuat dapatan bahawa eksibit P64 tidak melibatkan PW14 di dalam pencetusan idea untuk membunuh simati ataupun dalam pengenaan kecederaannya, hakim selanjutnya telah memutuskan bahawa tindakan kedua-dua tertuduh yang telah mengambil giliran

A memukul kepala simati dengan sekeping papan walaupun mengetahui bahawa simati sedang berbaring mengerang dengan kesakitan dengan jelas menunjukkan niat bersama di pihak mereka dalam memadamkan cahaya kehidupan daripada simati.

B **Case(s) referred to:**
Anandagoda v. The Queen [1962] 1 WLR 823 ***(refd)***
Kashmira Singh v. State of Madhya Pradesh AIR [1952] SC 159 ***(refd)***
Lemanit v. Public Prosecutor [1965] 1 LNS 89 FC ***(refd)***
PP v. Adetunji Adeleye Sule [1993] 4 CLJ 173 HC ***(refd)***
PP v. Lai Pong Yuen [1967] 1 LNS 125 HC ***(refd)***
C *PP v. Ling Tee Huah [1980] 1 LNS 212* ***(refd)***
PP v. Nordin Johan & Anor [1983] 2 CLJ 22; [1983] CLJ (Rep) 345 FC ***(refd)***
Sim Ah Cheoh & Ors v. PP [1991] 1 LNS 78 ***(refd)***

D **Legislation referred to:**
Criminal Procedure Code, s. 180(3), (4)
Evidence Act 1950, s. 30(1)
Penal Code, ss. 34, 302, 304

Evidence Act [Ind], s. 30(1)

E *For the appellants - Mohd Osman Ibrahim (Abdul Rahman Hj Mohamad Hasmi with him); M/s Osman Ibrahim & Co*
For the respondent - Awang Armadaya DPP

Reported by Amutha Suppayah

F

JUDGMENT

Syed Ahmad Helmy JCA:

G **[1]** Both the accused/appellants were charged with the murder of one Willy Tuoh Ching Chat (M) and the charge reads as follows:

> That you, in furtherance of the common intention of you all, on
H the 7th day of August 1998, between 1.30 a.m. to 6.00 a.m., at an unnamed road, off Jalan Kaka, Kampung Dato Baru, in the District of Sibu in the State of Sarawak committed murder by causing the death of one WILLY TUOH CHING CHAT (M) and thereby committed an offence punishable under Section 302 of the Penal Code read together with Section 34 of the same
I code.

[2] At the end of the prosecution's case the learned trial judge found that the prosecution had made out a *prima facie* case against both accused and called upon them to enter their defence as prescribed by s. 180(3) of the Criminal Procedure Code. According to s. 180(4) of the Criminal Procedure Code "a *prima facie* case" is made out against the accused where the prosecution has adduced credible evidence proving each and every ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[3] At the conclusion of the trial, the learned judge after evaluating all the evidence adduced found that the prosecution had proved its case beyond reasonable doubt and found both the accused guilty as per the charge and convicted them accordingly and passed the mandated sentence of death.

[4] This is both the accuseds' appeal against conviction and sentence.

[5] The brief facts of the case as appreciated by the learned trial judge was that both the accused were drinking liquor with nine or ten other persons in Kampong Bandong on the evening of 6 August 1998 and the early hours of 7 August 1998.

[6] At about midnight the deceased came riding a motor scooter. The 1st accused approached the deceased and after talking for about 2 to 3 minutes the 1st accused got on the deceased's scooter and they left the area and returned about 20 to 30 minutes later. After stopping for a while both of them again left the area. The group then left the place. The event aforesaid was related by PW11 (Frederick bin Jiri) and PW13 Eddy Syarizan bin Azman (Eddy) and corroborated by PW14 (Jormie Ryan bin Joe Menawan). PW14 who was also known as Andy together with the 2nd accused then went to the 1st accused's house "to relax" but the 1st accused was not home. When later the 1st accused returned home using the deceased's scooter, the 1st accused looked as if he was scared and he told PW14 that he had hit the deceased. The 1st accused then brought PW14 and the 2nd accused to a dead-end lane opposite Jalan Kaka in Kg. Dato Baru. PW14 saw the deceased "lying down with face downward" still breathing and groaning. PW14 then saw both the accused each using a piece of plank which they got hold from the side of

A the road hitting the deceased's head repeatedly. According to PW14 each of the two planks was about 3 feet long and an inch thick which they threw into the bushes. It is PW14's evidence that during and after the hitting by both the accused the deceased stopped groaning.

B

[7] PW14 testified that he could positively identify the body lying on the road as that of the deceased because the area was bright, lighted by moonlight and street light. PW14 then saw the 1st accused taking out a handbag from the compartment under the C seat of the deceased's scooter and the 2nd accused taking from the deceased's neck a necklace. The three of them then went back to the 1st accused's house by using the 2nd accused's motorcycle. The deceased's motor scooter was left at the scene where the deceased was assaulted.

D

[8] At the 1st accused's house, the 1st accused opened the handbag and took out cash of RM130, two rings, one bank card and some papers. The 1st accused told PW14 that he and the 2nd accused were going to test the bank card and both accused left the house. Whilst both accused were leaving the house PW14 E saw the 1st accused throwing the handbag and paper contents into the Rejang River behind the 1st accused's house. Soon thereafter both the accused returned and the 1st accused said something to the effect that the bank card was stuck. Both the accused and PW14 then went to sleep.

F

[9] The next morning the 1st accused divided the RM130 among the three of them whereby the 1st accused kept RM50 while PW14 and the 2nd accused were each given RM40. The two gold rings and necklace were kept by the 1st accused. All G relevant exhibits in the form of photographs of the deceased, the deceased's motor scooter, the dead-end lane, the 2nd accused's motor cycle and the two planks, and gold rings and necklace were identified by PW14 in court.

H **[10]** PW9 (Pau Kiu Mui) who operated a goldsmith shop identified the 1st accused as one of two male "Malays" who came to his shop and sold him the two gold rings and the necklace.

[11] The pathologist PW3 (Dr. Myint Soe) who conducted the I post mortem and its report identified the three more serious wounds namely the 5 x 1 x 1cm wound on the lower jaw with

fracture of the jaw bone; 4 lacerated wounds, the largest being 10 x 2 x 1cm on the back right side of head with a fracture of the skull; and 2 lacerated wounds the largest being 3 x 2 x 1cm on the back left side of the head with fracture of the skull. The cause of death according to PW3 was severe head injuries and the four lacerated wounds and two lacerated wounds mentioned above were the probable cause of death.

[12] Being satisfied that a *prima facie* case has been established by the prosecution the learned trial judge ordered both the accused to enter their defence.

[13] Both the accused upon being called to enter their respective defence elected to give an unsworn statement from the dock.

[14] The 1st accused in his unsworn statement denied culpability to the charge. He denied that he was the one who assaulted the deceased with the plank that caused the death of the deceased although admission was made that the earlier beating was done to ward off the sexual advances of the deceased. In advancing his version the 1st accused stated that he started to get angry and punched the deceased on the face because of the deceased's refusal to respond to the 1st accused's request to go back and insistence to wait for a while.

[15] On the aspect of the beating meted out against the deceased the crucial part of the 1st accused unsworn statement reads as follows:

> After I punched him on his face Ah Chai (the deceased) fell down to the ground on the tarred road. He got up and tried to fight back. He pulled at my shirt and tried to fight me. I pushed him away. I noticed a piece of wood nearby. He tried to fight with me, then I did not notice whether I hit him front and back. I just hit him. After hitting Ah Chai once or twice Ah Chai fell to the ground again. I hit Ah Chai again with a piece of wood I had used earlier at his back. After hitting him on his back I felt nervous. Then I started the engine of the scooter and went to look for my friend.

[16] Thereafter the 1st accused went back to his house where he met the 2nd accused and PW14. He then told PW14 that he had quarrelled with Ah Chai and asked them what he should do. He then brought PW14 and the 2nd accused to the place where

A Ah Chai had fallen and all three of them had a closer look at Ah Chai who was holding his head with both hands and groaning in pain and his right leg uplifted. He then went to Ah Chai's scooter when he heard the sound of hitting and Noorha's (the 2nd accused) voice talking to Andy and asking why he was hitting Ah
B Chai again. He turned around and saw Andy holding a piece of wood which he thereupon took away from Andy's hand and threw it away.

[17] The 2nd accused in his unsworn statement confirmed
C accompanying the 1st accused and PW14 to the dead-end road where the deceased's body was lying. When the 1st accused went to the deceased's scooter PW14 picked up a piece of wood and hit the deceased two or three times. He pushed PW14 away and asked why he hit the deceased. The 1st accused then came back
D and took the piece of wood from PW14's hand before throwing it away and going back to the scooter. When the 2nd accused asked PW14 as to why he hit the deceased again PW14 replied that the deceased would cause them trouble as he knew who PW14 was and where he lived. According to him PW14 then asked him to
E relax and assured him that nothing would happen. PW14 then asked the 2nd accused to take the gold chain from deceased's neck before going home.

[18] Learned counsel for the 1st appellant advanced five grounds
F in his memorandum of appeal against both conviction and sentence which can be summarised as follows:

1. First Ground. The learned trial judge erred in law and in fact in a finding that the prosecution had made out a *prima facie* case when it was against the weight of evidence.

G

2. Second Ground. The learned trial judge erred in law and fact for accepting the evidence of PW14 (Jormie Ryan bin Joe Menawan) who was an accomplice in order to link with the 1st appellant with the charge of murder.

H

3. Third Ground. The learned trial judge erred in law and fact in finding the 1st appellant guilty when the prosecution had failed to prove all the ingredients of the charge including the element of common intention beyond reasonable doubt.

I

4. Fourth Ground. The learned trial judge erred in law and fact for not considering the defence adequately. A

5. Fifth Ground. The learned trial judge had misdirected himself in the circumstances and development of the case for not convicting the 1st appellant of a lesser charge justifiable under s. 304 of the Penal Code which had caused a failure of justice. B

[19] The 2nd accused through his learned counsel also advanced five grounds in his memorandum of appeal which can be summarised as follows: C

1. PW14 is an accomplice whose evidence must necessarily be corroborated.

2. The prosecution failed to prove the element of common intention beyond reasonable doubt. D

3. There was no proof that the 2nd accused caused the fatal blow.

4. The prosecution failed to clarify the contradiction in the cautioned statement (exh. P64) of the 1st accused. E

5. The 2nd accused's explanation in his cautioned statement is consistent with his innocence.

[20] In his oral submission before us, learned counsel for the 1st accused informed us that the 1st, 2nd and 3rd grounds of appeal will be taken together for submission. F

[21] In essence the challenge mounted by him is whether the cautioned statement (P64) which was not challenged by the previous counsel of the 1st accused was properly admitted; whether the learned trial judge erred in accepting the evidence of PW14 who was an accomplice and whether the ingredients of the charge including the element of common intention has been proven by the prosecution beyond reasonable doubt. G H

[22] On the challenge against the cautioned statement P64 the outstanding and peculiar feature is that it comprises both exculpatory and inculpatory parts and it was introduced by the defence. I

[23] Though it is trite that a purely exculpatory or self serving statement is not evidence of the facts stated and the court ought not to take such statement into account for ordering an acquittal and discharge – see *PP v. Adetunji Adeleye Sule* [1993] 4 CLJ 173 – nevertheless the question arises whether the court can rely on the inculpatory part of the cautioned statement P64 to found culpability on the accused.

[24] Learned DPP in his written submission urges the court to find that the inculpatory part of the cautioned statement P64 of the 1st accused that relates to the admission that the 2nd accused hit the deceased with a plank is a confession which may be used against him and in support thereof drew our attention to the Federal Court case of *Lemanit v. Public Prosecutor* [1965] 1 LNS 89 where the Federal Court held that is could be used to implicate the accused if it was a confession.

[25] The Federal Court approved the test laid down in *Anandagoda v. The Queen* [1962] 1 WLR 823 and held:

> Applying this test (ie the objective test whether a statement amounts to a confession) to the statement made by the appellant in the case before us that although it contains protestations of innocence in some respects, it does contain taken as a whole without reference to extrinsic facts, an admission suggesting the inference that he committed the offence for which he had been arrested and on which he was subsequently charged. He clearly admits exploding a bomb at a place in Singapore. It is true that he states that he exploded it at a place where there were no people. This shows that he had no intent to cause injury to persons but there is nothing in the statement which indicates that he had no intention to cause injury to property. It therefore seems to us that the statement as a whole suggests the reference that he exploded a bomb at a place in Singapore with intent to damage property.

[26] We are persuaded and accept the submission of the learned DPP and hold that the statement of the 1st accused in P64 that the 2nd accused hit the deceased with a plank was clearly a confession and is evidence that may be used against the 1st accused.

[27] Learned counsel for the 1st accused submits that the contents of the cautioned statement P64 only goes to show the act and omission of the 1st accused being limited to the extent of the commission of an offence under s. 304 and/or causing grievous hurt under the relevant section of the Penal Code. It is learned counsel's submission that the contents of P64 shows that the fight between the 1st accused and the deceased was sudden and unmeditated and the 1st accused accidentally taking a plank found on the road and hitting the deceased at the back of the head. Notwithstanding the hitting the deceased was still alive which clearly negatives the intention to kill. It is further contended that the testimony of the pathologist PW3 lends support that there was the absence of intention to kill by his testimony that the injury at the back of the head was not the imminent cause of death. We have given serious consideration to learned defence counsel's submission and we find that the learned trial judge did address his mind to the submission of intention aforesaid in his finding that there was common intention. At p. 761 of the record of appeal the learned trial judge stated:

> ... it appears to me quite clear, that based on the accused's acts of taking turns in hitting the deceased's head with a piece of plank while the deceased was then undisputedly still alive there was common intention between the 1st and 2nd accuseds in the infliction of the further injuries upon the deceased with the intention of causing death, or in any case causing injuries with the intention of causing such bodily injuries as each of the two accuseds knew to be likely to cause the death of the deceased. And in such circumstances even if based solely on the evidence of PW14 seeing the two accuseds taking turns in hitting the deceased's head, what else could the natural consequence be of such hitting by each of the two accuseds except to snuff the life of the deceased?

[28] The learned trial judge emphasised that the nature of the wounds inflicted was such that whoever inflicted those blows must have intended to kill the person on whom they were inflicted and we could not agree more with the learned judge.

[29] We now come to the issue of whether PW14 was an accomplice that necessitated corroboration of his evidence.

[30] The thrust of both the learned counsel's for the accused on this issue was that PW14 was an accomplice whose evidence necessitates corroboration or warning before it could be accepted. Both counsel strenuously argued that the following facts show the status of PW14 as an accomplice.

1. He was at the scene of the crime and he was the one who introduced the deceased to the 1st accused.
2. He was the one who followed both the accused to the scene.
3. He did not report to the police/anybody else after the incident.
4. He agreed and accepted his share of RM40 out of the RM130 taken from the deceased.
5. He knew that the 1st accused had thrown the deceased's bag into the Rejang River behind his house.

[31] The learned trial judge in evaluating the evidence before him found that PW14 was not an accomplice. The learned judge in addressing and determining the question in the negative stated in his judgment at pp. 735-736 of the appeal record:

> The contention that PW14 is an accomplice would also appear to be untenable. As pointed out by the Learned Deputy Public Prosecutor and based on the evidence, PW14 merely followed the 1st and 2nd accuseds to the crime scene. PW14 witnessed but did not participate in the infliction of the injuries found on the deceased. This fact would appear undisputed. As contended by the Learned Deputy Public Prosecutor, PW14 was not a participes criminis concerning the charge against the accuseds. It would appear tenable the contention that PW14 was not an accomplice in the context of the relevant principles enunciated in *Re Soo Leot* [1956] MLJ 54 … In any case, there appears to be nothing in the evidence including those elicited during cross-examination, to indicate that PW14 took part or even intended to participate or shared common intention with the 1st and the 2nd accused in the infliction of the injuries that caused the death of the deceased. In fact there was no evidence at all to indicate that PW14 intended to inflict, and neither did he inflict any harm or injury at all upon the deceased.

[32] The learned trial judge also adverted to the 1st accused's cautioned statement P64 and P67 in support of his finding that PW14 was not an accomplice when he stated in his judgment at p. 749 of the record of appeal:

> But again the point remains that there is nothing in P64 which is at all indicative of PW14's intention to participate or actual participation in the infliction of any of the injuries sustained by the deceased. The fact – the non mentioning in either P67 or P64 of PW14's participation in the hitting of the deceased – substantially destroys the contention that PW14 is an accomplice.

[33] In arriving at the finding aforesaid the learned judge was of the view that the evidence of PW14 was not inherently incredible for acceptance. He dismissed the defence allegation that it was PW14's idea to finish off the deceased and that he was the person who actually hit the deceased. The learned judge reasoned, which we agree, that had there been any truth in the line of defence as alleged in their unsworn statement, it was both logical and natural for the 1st accused to have stated it in his cautioned statement P64.

[34] We have scrutinised the evidence adduced which led to the learned trial judges's finding aforesaid and we find that there is no error in his finding which warrants appellate interference.

[35] The learned judge in evaluating the unsworn statement of both accused against the whole of the evidence adduced rejected their respective defences which did not create any reasonable doubt. He found that the defence being one of denial and laced with inconsistencies is insufficient to create any doubt.

[36] We are of the view that there was no error in the trial judge's decision in rejecting the defence of denial. The inconsistencies in their unsworn statements and tested against the totality of the evidence adduced is clearly insufficient to create a doubt much less a reasonable doubt. As was stated by Yusoff Mohamed J (as he then was) in *Public Prosecutor v. Ling Tee Huah* [1980] 1 LNS 212 "a mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient."

We now turn our attention to the issue of whether P64 could be used to implicate the 2nd accused.

[37] P64 is the cautioned statement of the 1st accused which was tendered by the prosecution without any objection by the defence.

[38] The relevant passage in P64 which concerns and makes mention of the 2nd accused to the alleged crime appears from line 59 at p. 8 to line 9 at p. 9 and is reproduced hereunder:

> Saya bertanya kepada Norha, "macam mana ni", Norlia cakap "Kalau dia masih hidup nanti dia boleh cam." "Mahu tak mahu kena bunuh." Saya sebenarnya bercakap dalam Bahasa Malanau dengan Norha. Apa yang kami katakan adalah lebih kurang begini "Ijam, kubah gaya tuah bak man Ah Chai" Norha cakap "Mei, sih mak, mei mei binuk mak.
>
> Selepas itu Norha ambil satu kayu dari tempat buang sampah dan memukul muka Ah Chai saya dengar suara mengerang dari Ah Chai. Lepas itu Ah Chai tidak bergerak-gerak lagi.

[39] The learned trial judge having found that the content in P64 pertaining to the 2nd accused hitting the deceased with a plank is a confession which can be used against the 1st accused as the maker, the question arises whether it could be used to implicate the 2nd accused.

[40] On this score it is appropriate to advert to s. 30(1) of the Evidence Act 1950 which provides:

> When more person than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself and some other of those persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession.

[41] Section 30(1) aforesaid is in *pari materia* with s. 30 of the Indian Evidence Act and our courts have adopted the same construction as decided by the Indian cases in that the section allows the court to take into consideration the confession of an accused implicating himself and his co-accused along with other evidence but a conviction based on such confession cannot stand – see *Public Prosecutor v. Nordin bin Johan & Anor* [1983] 2 CLJ 22; [1983] CLJ (Rep) 345; *Sim Ah Cheoh & Ors v. Public Prosecutor* [1991] 1 LNS 78; *Hercun Sigh & Ors v. Public Prosecutor* [1991] 1 LNS.

[42] Though s. 30(1) of the Evidence Act 1950 allows the court to take the confessions of a co-accused into consideration and thereby make it evidence, it is not proof and can only be used in support of other evidence. In essence confession *per se* of a co-accused cannot be made the foundation of a conviction.

[43] The approach to be adopted was lucidly laid out in *PP v. Lai Pong Yuen & Ors* [1967] 1 LNS 125 where Ismail Khan J approved the approach taken by Bose J in *Kashmira Singh v. State of Madhya Pradesh* AIR [1952] SC 159 in that:

> The proper way to approach a case of this kind is, first to marshal the evidence against the accused excluding the confession altogether from consideration and see whether "if it is believed", a conviction could safety be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arises where the judge is not prepared to act on the other evidence as it stands even though, "if believed" it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.

[44] Though the accused did not raise any challenge to the admissibility of P64 nevertheless upon scrutiny of the evidence adduced as discernible from the testimony of PW9, PW11, PW13 and PW14 it is abundantly clear that there is evidence as to the culpability of the 2nd accused for which P64 could be used as an aid to support the conviction.

[45] PW 11 testified that at about midnight on 6 August 1998 the deceased stopped his motor scooter by the roadside in the Kampong Bandong area near the "Bernas Shop". He saw the 1st accused approaching and talking to the deceased before leaving the area riding pillion only to return about 20 to 30 minutes later before leaving the area again. PW11's evidence was similar to that of PW13 and the evidence of PW14 corroborated substantially the evidence of PW11 and PW13 as to the events that occurred at Kampong Bandong. PW14 testified that no one else other than the 1st accused approached the deceased. PW14 further testified that later that night the 1st accused returned alone to his house using the deceased's scooter looking scared and informing PW14

A that he had hit the deceased. The 1st accused then brought PW14 and the 2nd accused to Jalan Kampong Dato Baru in front of Jalan Kaka where there was a dead-end lane. PW14 saw the deceased "lying down with face downward" still breathing. He also heard the deceased groaning as he walked past the deceased's B body. He then gave an eyewitness account of the 1st and 2nd accused taking turns hitting the deceased's head with a piece of plank which they found at the road side. According to PW14 during and after the hitting by the accused there was no more groaning from the deceased PW14 also saw the 2nd accused C taking from the deceased's neck a golden necklace and the 1st accused taking out two gold rings from the deceased's handbag.

[46] Aside from PW14's testimony there was the testimony of the goldsmith Pau Kih Mei (PW9) that the 1st accused was one of D two male "Malays" who came to his shop at Channel Road, Sibu at 2.30pm on 8 August 1998 who sold him the two gold rings and gold necklace for RM120 and RM120 respectively.

[47] Before concluding, the challenge by learned counsel for the 2nd accused on the element of common intention needs to be E addressed. Learned counsel for the 2nd accused submits that the evidence of PW14 that the 1st and 2nd accused took turns to hit the deceased does not tantamount to the 2nd accused having common intention to hit the deceased. That the totality of the F evidence adduced and in particular to the statement in exh. P64 does not tantamount to the 2nd accused having common intention to kill the deceased more so in the light of the 2nd accused's action of hitting the face and the front side of the deceased's face which negatives the requisite intention to kill.

G **[48]** The learned trial judge directed his mind to the issue of common intention and after holding that the exh. P64 does not implicate PW14 in the hatching of any idea of finishing off the deceased, or in the actual infliction of further injuries upon the deceased concluded that the acts of both accused taking turns in H hitting the back of the deceased's head with a piece of plank knowing that the deceased was already lying down groaning in pain quite clearly indicates common intention on their part in snuffing out life from the deceased – see p. 792 appeal record.

I **[49]** We do not see any error in the learned judge's finding on the issue of common intention.

[50] We have scrutinised the totality of the evidence as presented and the judgment of the learned trial judge and it is our unanimous view that he had not misdirected himself on the law. He had addressed his mind, evaluated and considered the evidence of both the prosecution and the defence in great detail. He gave his reasons why he accepted and why he did not accept certain evidence before correctly arriving at his conclusion. We defer to his audio visual advantage on the evidence placed before him and there is no reason for us to interfere with his finding of facts. The appeal is accordingly dismissed and the conviction and sentence imposed by the learned trial judge affirmed.

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